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IN THE

Supreme Court of the United States

October Term, 1961.

No. 795

MEYER HARRIS COHEN, also known as MICHAEL "MICKEY" COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Meyer Harris Cohen, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the Southern District of California sentencing petitioner to be imprisoned for fifteen years and to pay a fine of $30,000.00 [3 C. T. 594].[1]

[1]The Record consists of four volumes of the Clerk's Transcript in the Trial Court, 41 volumes of the Reporter's Transcript and one volume of the Clerk's Transcript of the proceedings in the court below. The Clerk's Transcript in the trial court will be referred to by volume and page [*e.g.*, 3 C. T. 594]. The Clerk's Transcript in the Court below will be referred to by its volume number [C. T. 5] and the description, since that volume is not paginated. The Reporter's Transcript will be referred to by page [*e.g.*, R. T. .....].

OPINIONS BELOW.

Trial in the District Court was by jury.

The opinion of the court below [5 C. T.; 297 F. 2d 760], as amended following petition for rehearing, is appended hereto as Appendix "A."[2]

The judgment of the court below [5 C. T.] is appended hereto as Appendix "B".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed and the time of its entry is January 12, 1962 [5 C. T.].

2. Timely filed petition for rehearing was denied on February 14, 1962 [5 C. T.].

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Can one who has been convicted of attempting to evade or defeat income taxes for specific years be thereafter prosecuted under the same statute for attempting to evade or defeat the payment of those very same taxes for the precise years involved? Does not the second prosecution place the citizen in double jeopardy?

2. Does the Due Process Clause of the Fifth Amendment or the proper construction of Sections 272(a) and (b) and 273(a) of the Internal Revenue Code of

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[2]Other opinions involving bail questions before trial (283 F. 2d 50 (C. A. 9, 1960)), pending appeal to the court below (..... F. 2d ..... [9/13/61]; 82 S. Ct. 8, 7 L. Ed. 2d 13) and pending certiorari (..... S. Ct. ....., ... L. Ed. 2d ..... [1/30/62]; ..... S. Ct. ....., ... L. Ed. 2d ..... [2/14/62]) are not pertinent to the questions in this petition and so are not annexed hereto.

1939 permit one to be prosecuted and convicted for wilful attempt to evade or defeat the payment of taxes or for concealment of property with intent to evade or defeat the collection of taxes, where the Commissioner of Internal Revenue knows that the taxpayer is imprisoned as a result of a prosecution and conviction for attempted income tax evasion brought about at the instance of the Internal Revenue Service, and where the Commissioner, knowing where the taxpayer is, served by mail the "90 day notice" at the address where the taxpayer lived before the imprisonment and not at the place where the Commissioner knew the taxpayer was, there being no evidence that the taxpayer received, or knew of, the notice?

3. Where, in a prosecution for income tax evasion, the defendant offers to stipulate that he received the money and the amounts which the prosecution seeks to prove he did by way of witnesses, and where the prosecution rejects the stipulation and insists, and is allowed by the trial court, to elicit testimony as to the religious and other personal activities of the defendant, were the defendant's rights to freedom of religion and to a fair trial violated?

4. Is an oral denial a "statement" or "representation" within the meaning of 18 U. S. C. 1001?

5. Where the Government's own witnesses testify that the monies they gave to the petitioner were loans and where, at the time of the transactions here involved, there was no authoritative decision by this Court or by the court below that "ill-gotten gains" were income, was the evidence sufficient to show the necessary criminal intent required to sustain a conviction for violation of 26 U. S. C. 7201?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The First Amendment to the Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property without due process of law; . . ."

26 U. S. C. 7201 (68A Stat. 851) provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U. S. C. 7206(4) (68A Stat. 852) provides:

> "Any person who—
>
> "(4) Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; shall be guilty of a

felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

18 U. S. C. 1001 (62 Stat. 749) provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Sections 272 and 273 of the Internal Revenue Code of 1939 (former 26 U. S. C. 272 (53 Stat. 82 as amended by 56 Stat. 876 and 59 Stat. 673) and 273 (53 Stat. 84 as amended by 67 Stat. 583)) are set out hereinafter as Appendix "C".

STATEMENT OF THE CASE.

Basis for Federal Jurisdiction in the Court of First Instance.

The trial court had jurisdiction under 18 U. S. C. 3231.

Facts.

Petitioner was convicted on eight counts of a thirteen count indictment [3 C. T. 594]. Counts 2 and 3 [1 C. T. 3-4] charged violations of 26 U. S. C. 7201 by filing false and fraudulent income tax returns for the years 1957 and 1958, respectively. Count 4 [1 C. T. 5] charged violation of 26 U. S. C. 7201 during the years 1955 to 1960, by failing to pay income taxes assessed against him for the years 1945 to 1950 and by concealing the true state of his financial affairs. Counts 5, 8, 9 and 10 [1 C. T. 6, 9, 10, 11] charged violations of 26 U. S. C. 7206(4) during the years 1955-1960 by concealing specifically named property. Count 13 [1 C. T. 14] charged violation of 18 U. S. C. 1001 by making a false statement to the Internal Revenue Service as to his assets in 1957.

On July 9, 1951, petitioner was convicted under former 26 U. S. C. 145(b) on three counts for attempted evasion of income taxes for the years 1946, 1947, 1948 [3 C. T. 579; 1 C. T. 53-55], sentenced to prison for five years and to pay a fine of $10,000.00. This conviction was affirmed (201 F. 2d 386 [C. A. 9, 1953], cert. den. 345 U. S. 951).

On July 13, 1951, pursuant to that conviction, petitioner was in the custody of the United States, confined in the Los Angeles County Jail [R. T. 5055] and was served on that day and in that place, by Internal Revenue,

Agent Gibson, with a jeopardy assessment, for the said years 1946, 1947, 1948, and for 1945 [R. T. 5056, 5059; Ex. 846].

On August 9, 1951, petitioner still being in jail, 90-day deficiency notices for the same years were mailed to petitioner not where he was, but to the address where he had lived before his conviction, 513 Moreno Avenue, Los Angeles [R. T. 6958; Exs. 842, 843]. On May 8, 1952, petitioner then being in MacNeil Island Penitentiary, 90-day deficiency notices were mailed to the same Moreno Avenue address for the years 1949 and 1950 [Ex. 844].

There is no evidence that petitioner ever received the notices or knew about them, nor does the Government claim that he did [R. T. 6962].

According to the Government's own version of its case as to Counts 2 and 3 [R. T. 111, 115], the bulk of the monies it claims petitioner did not report as income came from interests given to various people in his life story. The Government claims these were "ill-gotten gains" and, not loans, as claimed by petitioner and as testified by the Government's witnesses themselves.

As to Counts 4, 5, 8, 9 and 10, the Government claims that the same monies which it holds to have been income under Counts 2 and 3, together with some specifically named property (set forth as separate concealment charges in Counts 5, 8, 9 and 10 (as well as in Counts 6, 7 and 11, as to which petitioner was acquitted)), was used to pay creditors other than the United States and otherwise concealed in order to evade and defeat the payment of taxes which were due for the years 1945 to 1950. As to these counts, petitioner contends factually

that there was no concealment, indeed that there was open and notorious use of the money and property and that as to some there was no ownership or leviable interest in him.

As to Count 13, the Government claims that petitioner answered falsely to an Internal Revenue Agent when he replied, in the negative, in 1957, to questions put to him as to whether, exclusive of monies he was getting in connection with his life story interests, rings and watches that a man might wear, clothing, furniture and other personal effects, he had any other assets [R. T. 5209-5255]. The monies the petitioner received which the Government claims were assets of his were concerning his life story and another item contended by petitioner to be a loan. Though excluded from the question then, the Government now claims that jewelry was included.

The Government put on many witnesses to show the amounts of money petitioner received and spent. Among these were persons (Vaus and Jones) who had themselves accepted Christ and who testified how they attempted to get petitioner to do the same [R. T. 728, 765]. Petitioner's counsel, because of the prejudicial nature of such testimony, offered to stipulate as to the amount of money petitioner received from Jones [R. T. 762], but the Government would not accept the stipulation (*ibid*) and the court let testimony in such as that Jones knelt and prayed with petitioner and "lead (sic) him in accepting Christ, and he turned his life over to Christ in my presence at the end of the prayer." [R. T. 765]. At another point, the court permitted a Government witness to testify as to a religious ceremony that was held in his home with petitioner [R. T. 1292].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

This Court Has Never Decided the Question as to Whether Due Process Permits Notice of a Tax Deficiency to Be Sent to a Place Where the Commissioner of Internal Revenue Knows the Taxpayer Is Not and Whether, There Being No Showing That the Taxpayer Received or Knew of the Notice, Notice so Mailed Can, Consistent With Due Process, Provide the Foundation for a Later Criminal Prosecution for Tax Evasion.

Nor Has This Court Decided the Question as to Whether, in the Case of a Taxpayer Who Has Been Convicted for Income Tax Violation and Is Incarcerated in an Institution Known to the Internal Revenue Agents, a Deficiency Notice Mailed to the Place the Taxpayer Lived Before Incarceration Is the "Last Known Address" Within the Meaning of Section 272(k) of the Internal Revenue Code of 1939 (Former 26 U. S. C. 272(k), Present 26 U. S. C. 6212(b)(1)).

These undecided questions alone serve as ample ground for the granting of certiorari (*Rule 19(1)(a)*, this Court). Concededly, the question of the adequacy of notice is a matter of due process of law. Additionally, the question is an important and existing one to the proper administration of the income tax laws.[3]

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[3]The provisions pertinent to this question are Sections 272(a), and (k) and 273(a) and (b) of the Internal Revenue Code of 1939, set out hereinafter in Appendix "C" hereto. Similar provisions are in the law today in the 1954 Internal Revenue Code (26 U. S. C. 6212(a) and (b), 6213(a), 6861(a) and (b).

A. The Assessments (Which Form the Bottom of Counts 4, 5, 8, 9 and 10) Were Invalid.

These counts, broadly speaking, allege concealment of assets to avoid the payment of taxes which had been assessed.

(1) *Petitioner Was Denied Due Process of Law.*

On July 13, 1951, pursuant to having been convicted of income tax evasion, petitioner was in the custody of the United States, confined in the Los Angeles County Jail [R. T. 5055]. There and on that day he was personally served by Internal Revenue Agent Gibson with a jeopardy assessment for the years 1945, 1946, 1947 and 1948 [R. T. 5050, 5059; Ex. 840].

On August 9, 1951, petitioner, still being so confined, 90 day deficiency notices for the said years 1945-1948 were mailed to petitioner at the address, 513 Moreno Avenue, Los Angeles, California, where he had lived before his conviction and not delivered personally to him at his place of confinement as had been the earlier notice [R. T. 6958; Exs. 842, 843].

There is no evidence that petitioner ever received the notices nor knew about them, nor does the Government contend that he did [R. T. 6962].

Under these circumstances, the assessments were invalid because petitioner was deprived of the notice required by the due process clause, and since Counts 4, 5, 8, 9 and 10 are posited upon there having been valid assessments, his convictions under those counts must fall.

In *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 314, 315, this Court said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .
>
> ". . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended . . . where . . . the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."

And in *Walker v. City of Hutchinson*, 352 U. S. 112, 115, the Court said:

> ". . . The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co. 339 US 306, . . . we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. . . . ."

In the instant case, the notice was not such as "is . . . reasonably calculated . . . to apprise interested parties." Nor were "the means employed . . . such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." If In-

ternal Revenue actually desired to inform the petitioner of the deficiency notice, and of his rights and obligations pertaining thereto, all it had to do was to do as it had done with reference to the previous notice, send an agent across the (Spring) street and hand petitioner such notice. Certainly the method of giving notice used here was "substantially less likely to bring home notice than (an)other of the feasible and customary substitutes." Here the feasible and customary manner of giving petitioner notice was precisely the manner previously used by the Service in serving upon petitioner in the jail the earlier notice. Here, as in *Walker* (352 U. S. at 116), "there seem to be no compelling or even persuasive reasons why such direct notice can (could) not be given."

The Court below considered the failure to receive actual notice as not of constitutional stature within the meaning of *Mullane v. Central Hanover Bank*, 339 U. S. 306, and *Walker v. City of Hutchinson*, 352 U. S. 112, because that only deprives the taxpayer of the right to go to the tax court and he could still contest the validity of the assessment "by paying the tax, filing a claim for refund, and if that be denied, suing in the District Court or Court of Claims" (Appx. A, 20). We submit that with such a large amount involved, particularly with the taxpayer in jail, such a procedure as the price of constitutional protection is unreasonable.

"When notice is a person's due, process which is a mere gesture is not due process." (*Mullane, supra*, 339 U. S. at 315.) The Service accorded petitioner a gesture; the Constitution requires more.

(2) *The Statute, if Properly Construed, Does Not Violate Due Process but Was Not Complied With Here; if Construed so as to Be Adjudged as Having Been Complied With, it Violates Due Process.*

The discussion here is concerned not only with the deficiency notices for the years 1945 through 1948 mailed on August 9, 1951 at which time petitioner was confined in the Los Angeles County Jail, which were the subject of the discussion just completed under Point I, A, (1), but it is also concerned with the deficiency notices for the years 1949 and 1950 [Ex. 844], mailed to the Moreno Avenue address on May 8, 1952, at which time petitioner was confined in MacNeil Island Penitentiary. As to this notice, as well, there is no evidence that petitioner ever received or knew about it, nor does the Government contend that he did [R. T. 6962].

It seems clear that the statutory provisions (§§ 272(a)(1) and (k) and 273(a) and (b)) have for their purpose, a reasonable method of effectuating actual notice. Were it otherwise, of course (were it a "mere gesture" statute), a grave constitutional question is raised. The Government though vacillating as to just how this was to be accomplished,[1] has consistently so construed them. Thus at page 7 of its brief in *Boren v. Riddell*, 241 F. 2d 670 (C. A. 9 1957), the Government said:

> ". . . (T)he mode of serving the deficiency notice on the taxpayer (was left by the Statute)

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[1] In *Tenzer v. Commissioner*, 285 F. 2d 956, 958 (1960), the court below said that the Government had repudiated its argument in *Boren v. Riddell*, 241 F. 2d 670 (C. A. 9, 1957), and was now contending "that the mailing to Tenzer was enough without actual delivery." The Government so contended in the instant case [R. T. 6962].

within the Commissioner's discretion as to how and in what manner it should be done *effectively* (italics in original) *according to the circumstances involved* (that is, by registered mail, ordinary mail, manual delivery by revenue agents, etc.). The Statute was so designed by Congress to *make sure that the taxpayer would certainly, if possible, receive the notice* in timely fashion in order to have full opportunity to file a petition for redetermination of the deficiency. . . . ." (Second, and third italics and first parentheses added.)

And even in its brief in *Tenzer v. Commissioner*, 285 F. 2d 956 (C. A. 9, 1960), (p. 8, f.n. 2), though contending that "mailing . . . . was enough without actual delivery," the Government said:

". . . . The purpose of the statute is to put a taxpayer on notice of the administrative determination and to allow him a sufficient opportunity to file a petition for redetermination with the Tax Court if he chooses . . . . The administrative practice of *seeking to accomplish the purpose of the statute by achieving actual notice as far as practicable* is exemplified by the manual delivery as in this case, *Dolezilek v. Commissioner*, supra, and *Goldstein v. Commissioner*, 22 T.C. 1233; telephonic contact *D'Andrea v. Commissioner*, 263 F. 2d 904 (C.A.D.C.) and re-mailing as in *Teel v. Commissioner*, 248 F. 2d 749 (C. A. 10th) and *Boren v. Riddell*, supra." (Italics in text added.)

But if this be the case, then the mailing by the Commissioner of the notice to Moreno Avenue, Los Angeles, a place where he knew the petitioner was not, did not comply with the statute.

The only other case (*Barack v. United States*, 52 U. S. Tax Cases (C. C. H. Service) par. 9961 (D. C. E. D. Mo. 1956)) which most closely resembles the facts of the instant case is in conflict herewith. In that case, as here, the Internal Revenue Agents knew that the defendant was in jail, but sent the notice to his home where he had lived before conviction and where his sister lived at the time. The assessment was held to be void because not sent to the "last known address". The court below sought to distinguish *Barack* on the ground that at the time of the notices in the instant case, the conviction was not yet final, but said (5 C. T., Appx. A, 24) that "in any event" that decision "is not binding on us." True, *Barack* is a decision by a District Court and not by a Court of Appeals, so that strictly speaking within the language of Rule 19(1)(b) of this Court petitioner cannot say there is a conflict of *circuits*. Nevertheless, the existence of that decision does show a difference of respectable judicial opinion and because of the importance of the question warrants the granting of certiorari.

The Court below concedes (Appx. A, 20) that the scheme of the statute is such as to require that mode and place of notice as will most likely give actual notice. But it fails to concede that such was not done here as to the August 9, 1951 mailing. Yet, when it is considered that the Agents, as to the jeopardy assessments with all their drastic consequences, took pains to walk across the street to personally hand the first notice to petitioner, but, though having the same information, at the time of the required notices of deficiency failed to do so, it would appear that the Agents were doing anything but giving the kind of notice best calculated to give actual notice.

The Court concedes (Appx. A, 20-21) that if the Commissioner or his agents "learn that the taxpayer has changed his address . . . he must use the new address." But such is precisely the case here. The service of the 10 day notice, in regard to the jeopardy assessments, on the petitioner in jail conclusively shows that the Commissioner or his agents knew of petitioner's change of address. It was they who effectuated that change. Under the circumstances of this case to regard this as temporary is to disregard the actual facts of the case.[5]

As to the 1948 notice, the Court's conclusion (Appx. A, 21) that "(t)he Commissioner had not been notified that 'separate residences' . . . had been established" is, we believe, impermissible. This only points up the conflict between this case and *Barack*. When the Commissioner and his agents cause a prosecution which results in a sentence of five years imprisonment and the defendant is in jail pursuant to that sentence, we believe that is sufficient notice to the Commissioner that the defendant has established a "spearate residence" from his wife.

Likewise impermissible, we believe, is the Court's rationale (Appx. A, 22) that because in the case of a jeopardy assessment the Commissioner may proceed

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[5]Even *Gregory v. United States*, 57 Fed. Supp. 962, 973 (Ct. Cl. 1944), cert. den. 326 U. S. 747, recognizes that a "temporary address of a definite duration" is a proper place to which notice should be directed.

to collect unless the taxpayer puts up a bond within 10 days after the 10 day notice, to stay collection, the 90 day letter requirement is inconsequential. This reasoning, we submit, reads the provision of §273(b) (Appx. C) right out of the statute. That section says that if a jeopardy assessment is made before the mailing of notice, "the Commissioner *shall* mail a notice . . . within sixty days after the making of the assessment." (Italics added.) It may well be that in the case of a jeopardy assessment, *if* a proper notice is mailed within 60 days thereafter, a proceeding before the Board of Tax Appeals or in the Tax Court will not stay the hand of the Commissioner to enforce collection no bond having been put up within 10 days, but this does not mean that if the proper mandatory notice is not given, the assessment is nevertheless valid. None of the cases cited by the Court (Appx. A, 23) so holds. The statutory scheme is an integrated one. The jeopardy assessment procedure affords the Commissioner extraordinary rights to take care of an emergency. But Congress has required the Commissioner to perfect that right. Otherwise the *requirement* for the service of a deficiency letter even in the case of a jeopardy assessment would be meaningless.

The Court concedes (Appx. A, 23) that the jeopardy assessment rationale does not apply for the years 1949-1950 as to which years no jeopardy assessments were made, the Commissioner having followed the more normal procedure of §272(a). At the time (May 8, 1952) of the deficiency letters for those years, petitioner

was at MacNeil Island Penitentiary and the Commissioner knew this. Petitioner respectfully disagrees with the reasoning of the court below that (Appx. A, 23) "(t)he Commissioner's knowledge that Cohen was in MacNeil Island was not knowledge that Cohen and his wife had established 'separate residences.'." It is submitted that under the circumstances of this case, where we are concerned with the precious right of notice, such knowledge in the Commissioner does indeed mean knowledge of a separate residence. The federal cases (*United States v. Gronich*, 211 Fed. 548 (W. D. Wash.); *Neuberger v. United States*, 13 F. 2d 541, 542-543 (C. C. A. 2, 1926)) cited by the Court (Appx. A, 23) having to do with the question of whether one's residence, for the purposes of the naturalization laws, is interrupted by incarceration or involuntary military service in a foreign country do not assist in the question here. "Congress in drafting laws . . . may use the same words broadly in one context, narrowly in another." (*Lee v. Madigan*, 358 U. S. 228, 231.) "Statutory language is construed to conform as near as may be to traditional guarantees that protect the rights of the citizen." (*Lee v. Madigan*, *supra*, at p. 235.) Here we are concerned with the due process right of notice. It is submitted that the Commissioner knew, for this purpose, that petitioner had a "separate residence" from his wife. The ability of one in prison to handle his affairs is difficult enough without his being visited with the additional burden of having no-

tice imposed upon him by the Government in mailing a notice to a place where it knew he was not.

The final reasoning of the Court (Appx. A, 23)—that even if the 1949-50 assessments were invalid, the conviction would not be affected because it believed that the jury would have come to the same conclusion even if it had been instructed that those assessments were to be disregarded—runs counter to previous pronouncements by this Court. The Government in Count 4 of the indictment, though describing the separate assessments, lumped them all together. And in the related counts (5, 8, 9 and 10) it did not even separate the assessments. Who is to say how the jury would have decided had it known that at least some—we say, all—the assessments were invalid? Since the verdict is not supportable if the jury decided on the basis of the validity of the 1949-1950 assessments, reversal is called for here even more strongly than in those cases which require the verdict to be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected" (*Yates v. United States*, 354 U. S. 298, 312), for here the jury was not even given the choice of rejecting the impermissible ground.

In short, the question calls for hearing by this Court.

II.

This Court Has Never Decided Whether Under the Tax Evasion Statute, a Taxpayer May Be Tried and Convicted for Evasion and Avoidance of Taxes for a Specific Year and Thereafter Be Tried for Evasion and Avoidance of the Payment of That Tax for the Same Year.

The court below conceded that the correctness of its ruling as to whether this constituted double jeopardy has never been passed upon (Appx. A, 16). The novelty and importance of the question to the administration of the income tax laws is manifest.

A. Petitioner Was Twice Tried for the Same Offense.

In 1951 petitioner was convicted for the "wilful and knowing evasion of his income taxes for the years 1946, 1947 and 1948." (201 F. 2d 386, 388). The statute at that time was 26 U. S. C. 145(b), which read in pertinent part:

> ". . . any person who wilfully attempts in any manner to evade or defect any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The statute under which petitioner was prosecuted in Count 4 (present 26 U. S. C. 7201) is the successor statute and reads identically.[6]

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[6]The court below concedes this (Appx. A, 15).

Count 4 of the present indictment reads in pertinent part [1 C. T. 5]:

> "commencing on or about the 10th day of October, 1955 . . . . Cohen did wilfully and knowingly attempt to evade and defeat the payment of income taxex then due and owing . . . for the years 1945 to 1950, inclusive, and duly assessed against him as follows: . . ."

It is thus seen that petitioner is now being prosecuted for attempting to evade and defeat the payment of the very taxes for the very same years as to which in 1951 he was convicted for attempting to evade and defeat.

Purely from the standpoint of fundamental fairness, which, we apprehend, lies at the base of the Fifth Amendment guarantee against double jeopardy, there is just something wrong about the concept of the Government prosecuting, convicting, fining and imprisoning a man for evading the payment of his taxes for certain years and then turning right around and again prosecuting, convicting, fining and imprisoning him for his not having made the very payments for failure of which he was previously imprisoned and fined. A civilized government need not do this, nor, we submit, does the statute require or permit it.

Petitioner appreciates that the Court below seeks to make a distinction between evasion and defeat of the *tax* and evasion and defeat of the *payment* of the tax. But under the circumstances of this case, this is a distinction without a difference. Petitioner was previously prosecuted, imprisoned and fined becuse he did not pay the taxes he should have paid for the years 1946, 1947 and 1948. No matter how the language is changed, no

matter what reasoning is attempted, he is now being prosecuted for the same thing.

The example relied upon by the Court below (Appx. A, 16) from its decision in *Norwitt v. United States*, 195 F. 2d 127, 133, is not, we submit, analogous to the case at bar. Petitioner here did not escape; he was tried, convicted, sentenced, fined and imprisoned. More in point, we believe, is *Yates v. United States*, 355 U. S. 66, where the trial and appellate courts sustained convictions for 11 separate contempts of court but where this Court found only one.

The legislative history is not helpful on the question (*Cf. Spies v. United States*, 217 U. S. 492, 495). We do know, however, that in enacting the 1954 Code, Congress took that portion of Section 145(b) which made it a felony to "pay over" a tax which one had collected or was supposed to have collected, which portion of the section was separated from the portion here involved by a comma, and made a separate statute out of it (26 U. S. C. 7202). Because of this, as to an analogous Section (1718(b) of the 1939 Code), the Fifth Circuit felt justified in holding that the "pay over" part of the section was a separate crime from the "evade or defeat" portion (*Reynolds v. United States*, 288 F. 2d 78 (C. A. 5, 1961)). But there is no such rationale as to the present problem. Not only did Congress not put the two portions in separate sections in the 1954 Code, but there never was, and there isn't today even a comma separating the words. The section read and reads:

> "Any person who wilfully attempts *in any manner* to evade or defeat any tax imposed by this title or the payment thereof shall. . . ." (italics added).

Thus the justification for the court below in finding separate crimes because of the use of the word "or" (Appx. A. 15) must fail. Indeed, it proves too much. Under the Court's reasoning that because of the disjunctive there are two separate crimes, one relating to the tax and one relating to the payment of the tax, that same reasoning would also mean that not two but *four* crimes were created, one relating to evasion of the tax, the second to defeat of the tax, the third to evasion of the payment of the tax and the fourth to defeat of the payment of the tax. This would be so because no single "or" in the section should be given any more nor less weight than any other.

But not even the court below goes this far. In describing the Government's claim, the Court said (Appx. A. 15), "The government says that a willful and knowing attempt to evade the *payment* of the tax is different from a willful and knowing attempt to evade and defeat the *tax*." (italics in original). Thus note that in the first part of the sentence the "defeat" part of the statute is entirely omitted and in the last part the "or" has become "and." Similarly, later in the same paragraph *(ibid.)* the court uses the conjunctive in referring to 'evade and defeat." Thus the Court is saying that one "or," that between "evade" and "defeat", means "and," but another "or," that between "tax" and "payment thereof" does indeed mean "or."

There is no justification for this, non-existent, distinction. It is manifest that what Congress was getting at was to punish the willful attempt to "in any manner" not pay the tax.[7] And that it just set forth

[7] "This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation." *(Spies v. United States,* 317 U. S. 492, 498-499.)

a number of ways of committing that one crime. "When a statute denounces a series of acts or the doing of several things, but attaches one penalty only to them, the prosecutor, if he chooses less than all, and is unsuccessful, cannot then prosecute again under the portions of the statute which he chose to omit."[8] The same follows, of course, when the prosecutor is successful. In referring to the section, this Court has not differentiated between the tax and the payment thereof, but has described it as a statute denouncing the attempt "'in any manner to defeat and evade' the payment of an income tax." *(United States v. Johnson*, 319 U. S. 503, 515).

The statement of the Court below (Appx. A, 16) that the assessment was made after petitioner's prior conviction is of no moment. The statute under which petitioner is charged (26 U. S. C. 7201), as its predecessor (former 26 U. S. C. 145(b)), proscribes evasion or defeat of a tax *imposed* or the payment thereof, *not* of an assessment. The tax was imposed, as petitioner's first conviction bears witness, not by the commissioner's assessment in 1951, but by law in the years 1946, 1947 and 1948.

Likewise, the Court's observation (Appx. A, 16) that what petitioner was convicted of in 1961 was conduct occurring four years after his conviction in 1951, misses the meaning of double jeopardy. If the "evade or defeat" portion of former Section 145(b), and the whole of present 26 U. S. C. 7201, sets forth but one offense, petitioner cannot even be required to stand trial a second time. "The prohibition is not against being twice punished, but against twice being put in jeopardy:

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[8]Judge Yankwich in *United States v. Harris*, 26 Fed. Supp. 788, 789 (S. D. Cal. 1939).

and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." (*United States v. Ball*, 163 U. S. 662, 669; see also, *Green v. United States*, 355 U. S. 184, 187-188).

In 1951 petitioner was tried and convicted for his income tax crimes relating to the years 1946, 1947 and 1948. That should be enough. At minimum, the question calls for hearing by this Court.

III.

The Introduction of Evidence Calculated to Question the Good Faith of Petitioner's Religious Beliefs Violated His Rights Under the First Amendment; This Together With Other Highly Inflammatory, Prejudicial and Irrelevant Evidence, Deprived Petitioner of a Fair Trial.

Over objection because "it is so prejudicial" [R. T. 762] the trial court permitted the witness Jones to testify [R. T. 765] as to the religious experience he had with petitioner. An example of the prosecutor's attempt, undoubtedly successful, to interject religion in the case and prejudice the jury against petitioner on an irrelevant matter is seen from this excerpt [R. T. 765]:

> "Q. You and Mr. Cohen were on your knees in Mr. Cohen's apartment? A. That is correct.
>
> Q. You led Mr. Cohen in some prayers? A. That is correct.
>
> Q. Mr. Cohen verbally accepted Christ? A. He repeated the acceptance that I quoted to him in the same manner that the person who led me to Christ led me into this decision."

There was no need for this testimony. Petitioner's counsel offered to stipulate as to the amount of money

he received from Jones [R. T. 762], but the prosecution would have none of that. Instead it insisted, as seen, in going into such religious matters,[9] so as to be able to question the religious beliefs of petitioner.

As the sample questions and answers set forth above show, the testimony was no surprise to the prosecution but was carefully and designedly elicited. Moreover, that this had been the plan of the prosecution from the beginning is seen from the fact that in the "Plaintiff's Questions to be asked of Prospective Trial Jurors," submitted to the court before trial, appears this request [2 C. T. 258]: "Are your own personal religious convictions of such a nature that they would in any way unduly bias or influence your judgment?"

The Government, thus, put petitioner's religious beliefs on trial and the District Court permitted it. The evidence, of no probative value especially in view of the offered stipulation, could, and did, have only one effect: "to arouse passion and prejudice" (*Viereck v. United States*, 318 U. S. 236, 247).[10] Its admission deprived petitioner of a fair trial.[11]

Government counsel said (Appx. A. 7) that petitioner was "involved in a confidence game to obtain money from these people" thus placing the good faith of peti-

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[9]It did the same thing as to two other witnesses [R. T. 1202, 728].

[10]See also, *Ross v. United States*, 180 F. 2d 160, 167-168 (C. A. 6, 1950).

[11]*Cf., United States v. Grayson*, 166 F. 2d 863, 870 (C. C. A. 2, 1948), Judge Frank's concurring opinion; *Kotteakos v. United States*, 328 U. S. 750; *Bihn v. United States*, 328 U. S. 633; *Bollenbach v. United States*, 326 U. S. 607; *Weiler v. United States*, 323 U. S. 606; *Bruno v. United States*, 308 U. S. 287.

tioner's religious professions on the block.[12] And yet, in its own brief in the Court below (p. 9) the Government said:

> ". . . All of the expenditures of Mr. Jones on behalf of appellant were gifts; . . ."

Thus we have prejudicial error compounded: petitioner's counsel offered to stipulate as to the amounts *plus* the fact that they were in any event gifts, not income. On what basis, therefore, could the religious professions be relevant? We assert: on none and the prejudice was great.

The Court below characterizes (Appx. A. 8) the religious issue as minor in this case and opines that it cannot believe the result would have been different had the testimony as to religion not been present. A sufficient answer to this is the fact that the trial court at the time of sentence took occasion to say (quoted in the opinion of the Court below; Appx. A. 35) that religion (meaning again that the court was questioning the good faith of petitioner's religious beliefs) was not excepted by petitioner as a means towards his ends. And who is to measure the effect on the jury of this kind of an argument made by the prosecutor to it [R. T. 7648-7649]:

> "Did Mr. Cohen accept Christ in his apartment with Mr. Jones and then go back to New York to see Mr. Graham and then make the statement that they offered me $15,000 and so on to go out on the trial?
>
> "We saw the evidence brought in here that Mr. Cohen was rewarded—singled out, at least, for

[12] In its brief in the Court below, the Government said (p. 38) that petitioner had made misrepresentations as to religion.

his—the efforts he made on behalf of the Jewish people involved in the Israel wars, at least, prior to 1948 were the dates on the silver box and on the Bible.

"So just what will Mr. Cohen do for money?"

The prejudice to petitioner of this evidence as exemplified in this type of argument manifests itself even in the opinion of the Court below, we respectfully submit. Despite the fact that petitioner offered to stipulate as to the amount and despite the fact that the Government in its own brief (p. 9) states that the moneys expended by Jones were gifts, the Court states (Appx. A, 7) "the way of the confidence man would be easy if he could obtain money from the religious by wilfully false protestations of belief and then, when brought to book, take refuge in the First Amendment."

"Did Mr. Cohen accept Christ?" We submit that asking a jury to pass upon that question is to "enter a forbidden domain" (*United States v. Ballard*, 322 U. S. 78, 86). Much of the unhappy part of the history of the world has occurred because of the sensitiveness people have toward religion, both their own and what they regard as the lack of faith, good faith or not, in others. It was for this reason that the First Amendment sought to separate religion from the public domain and which, we submit, prohibits any court or jury from questioning the good faith of one's religious beliefs.

The Court below was of the view that this Court's decision in *United States v. Ballard*, 322 U. S. 78, did

not decide that a court may not pass on the good faith of one's religious professions, but it does recognize (Appx. A, p. 8) that Mr. Justice Jackson's opinion in that case does stand for that very proposition. We think this Court's decision in *Ballard* did decide that a court cannot decide whether a man "accepted Christ". But if it did not, the Court should now so decide.

There are numerous other instances of irrelevant, inflammatory evidence coming into the case, not to prove the charges in issue, but to prejudice the jury against petitioner.[13]

An unfair trial is too grave a wrong in our constitutional scheme. Hearing should be granted.

[13]For example: the purported arranging by petitioner for a defendant, Candy Barr, who was petitioning this Court for certiorari (*Phillips v. Texas*, 361 U. S. 830) to skip bail in Mexico [R. T. 4854-4859, 4867, 5010, Exs. 830-A, 821, 821-A], which she did not do [R. T. 4859]; the description of petitioner's lady acquaintances as strippers and working in burlesque, [R. T. 3988, 3991, 4823]; that petitioner had announced his engagement to a dancer as a publicity stunt [R. T. 3992, 4000-4004, 4593-4598]; implying by innuendo that petitioner had been engaged in a hold-up and anonymous threatening calls for money—*i.e.*, a "shakedown" never connected up with petitioner [R. T. 1836-38, 1841-42, 1870-1874], so flagrant was this latter that the trial court, though denying a mistrial [R. T. 1929] granted a motion to strike the testimony [R. T. 1959] and admonished the jury to disregard it [R. T. 1961-63]; but the damage was done (*cf.* Mr. Justice Jackson in *Krulewitch v. United States*, 336 U. S. 440, 453, and *Scott v. United States*, 263 F. 2d 338, 401-402 [C. A. 5, 1959]); other anonymous threatening calls never connected to petitioner [R. T. 2316]; and other testimony not germane to the proceedings [R. T. 347-350, 2251].

IV.

The Conviction of Petitioner for Violation of 18 U. S. C. 1001 on the Basis of Oral Denials to Questions Put by an Internal Revenue Agent in an Interview Is Contrary to an Applicable Decision of This Court or Is a New Question Never Before Decided by This Court.

This point goes to the conviction of petitioner on Count 13 [C. T. 15]. The Court below did not consider the question because of its view that the conviction on Count 4 should be sustained, the sentence on Count 13 running concurrently therewith (Appx. A, 1-2).

A. An Oral Denial Does Not Constitute a "Statement" or "Representation" Within the Meaning of 18 U. S. C. 1001.

In *United States v. Gilliland*, 312 U. S. 86, 93, this Court traced the legislative history of the Section and, with reference to an earlier enactment, said:

> "The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used *in documents or affidavits* in any manner within the jurisdiction of any department or agency of the United States." (italics added).

In its brief in the Court below in answer to petitioner's reliance on *Gilliland*, the Government contended (p. 107) that the case did not stand for the proposition because the factual situation before the Court involved a written statement. Nevertheless, the legislative history outlined by the Court, culminating in the statement above quoted demonstrates, we believe, that mere oral

denials are not within the meaning of the statute. If we are wrong, then the question is open and there is additional reason for the granting of certiorari.

In *United States v. Phillipe*, 173 Fed. Supp. 582, 584 (S. D. N. Y. 1959), the court said:

> "Proceeding then to the merits, the issue which we have for determination is, whether a false oral denial by defendant of a suspected source of income made to a Special Agent of the Internal Revenue Service investigating and interrogating defendant for possible criminal income tax evasion constitutes a false statement within the purview of 18 U. S. C. 1001? We think not."

Petitioner's contention is correct.[14] Hearing should be granted to establish the principle. The importance to the proper administration of the criminal and income tax laws is manifest.

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[14]See also, *United States v. Levin*, 133 Fed. Supp. 88 (D. Colo. 1953), *United States v. Davey*, 155 Fed. Supp. 175 (S. D. N. Y. 1957), and *United States v. Stark*, 131 Fed. Supp. 190 (D. Md. 1955).

V.

The Uncertainty of the Law at the Time Here Involved With Respect to the Taxability of the Funds in Question Precluded a Finding of the Necessary Criminal Intent.

Assuming, *arguendo*, that the funds received by petitioner in 1957 and 1958 (Counts 2 and 3) were "ill-gotten" gains, as claimed by the Government, and not loans, as claimed by petitioner, nevertheless the law was such at the time as to preclude a finding of the necessary criminal intent. The funds were not embezzled funds, nor were they extorted. At most they were funds obtained by fraud or misrepresentation.

The state of the law in 1957-1958 as to whether such funds were income was uncertain. There was no decision on the subject by the Court below. As to embezzled funds, this Court in 1946 had held they were not taxable (*Commissioner v. Wilcox*, 327 U. S. 404). As to extorted funds, this Court in 1952 had held that they were taxable, but *Wilcox* was not overruled (*Rutkin v. United States*, 343 U. S. 130). Thus the law was that some "ill-gotten" funds (extorted) were income but others (embezzled) were not. There could therefore not be, we submit, as a matter of law the necessary criminal intent. The case is essentially the same as that in *James v. United States*, 366 U. S. 213, where *Wilcox* was overruled, but the petitioner's there conviction was reversed and the indictment ordered dismissed. In so doing, this Court said (366 U. S. at 221-222):

> "We believe that the element of willfullness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income

> in the year of misappropriation so long as the statute contained the gloss placed upon by it Wilcox at the time the alleged crime was committed. Therefore, we feel that petitioner's conviction may not stand and that the indictment against him must be dismissed."

The same rationale is present here where the "gloss" was uncertainty. The fact relied upon by the Court below (Appx. A. 13-14) that some other circuits had held that money obtained by fraud was income, does not change the picture; the matter was still uncertain. As to embezzled funds as well, after *Rutkin*, as this Court pointed out in *James* (366 U. S. at 217, f.n. 8), a number of circuits[15] had held that *Rutkin* had repudiated *Wilcox*. Nevertheless, as seen, this Court ordered the indictment dismissed.

With the circumstance here, as in *James*, of the uncertainty of the law, there could not be the necessary criminal intent.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Attorneys for Petitioner.

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[15]Including the Seventh (*Macias v. Commissioner*, 255 F. 2d 23) from which the *James* case itself came, a circumstance not true as to the Ninth Circuit from which the instant case comes.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEYER HARRIS COHEN, aka MICHAEL "MICKEY" COHEN, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*	No. 17,503 Jan. 12, 1962

On Appeal from the United States District Court for the Southern District of California Central Division

Before: BARNES, HAMLEY and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge:

Cohen was convicted under eight counts of a thirteen count indictment, his motion for new trial was denied, and he appeals. The sentences under counts 2, 3 and 4 are each $10,000 fine and five years imprisonment, the fines cumulative and the prison terms consecutive. The sentences under counts 5 and 9 are each $5,000 fine and 2½ years imprisonment, the fines cumulative and the prison terms consecutive, but these fines and terms are concurrent with those imposed under count 2. The sentences under counts 8 and 10 are each $5,000 fine and 2½ years imprisonment, the fines cumulative and the prison terms consecutive, but these fines and terms are concurrent with those imposed under count 3. The sentence under count 13 is the same as, and concurrent with, that under count 4. Thus the total fines are $30,000 and the total prison terms are fifteen years.

We will therefore consider, first, those contentions that relate to all counts, and, second, those that relate to counts 2, 3 and 4. Only if we find that the conviction under one or more of

those counts cannot stand will it be necessary to consider contentions that relate to one or more of the remaining counts.[1]

Counts 2 and 3 charge violation of 26 U.S.C. §7201, by wilful filing of false and fraudulent income tax returns for the respective years 1957 and 1958. Count 4 charges violation of 26 U.S.C. §7201 in wilfully attempting to defeat and evade the payment of income taxes duly assessed for the years 1945 to 1950, inclusive, by various fraudulent means. Counts 5, 8, 9 and 10 charge violations of 26 U.S.C. §7206(4), concealment of property on which levy is authorized, with intent to evade and defeat the collection of income taxes then due, for the years mentioned in count 4. Count 13 charges violation of 18 U.S.C. §1001, a false statement to the Internal Revenue Service.

The trial was a long one. There were over 180 witnesses, and there are more than 8,000 pages of reporter's transcript. 947 government exhibits and 27 defense exhibits were introduced. Under these circumstances, it would unduly prolong this opinion

[1] Barrenblatt v. United States, 1959, 360 U.S. 109;
Sinclair v. United States, 1929, 279 U.S. 263;
Abrams v. United States, 1919, 250 U.S. 616;
Claassen v. United States, 1891, 142 U.S. 140;
Lawn v. United States, 1958, 355 U.S. 339;
Hirabayashi v. United States, 1943, 320 U.S. 81;
Brooks v. United States, 1925, 267 U.S. 432;
Stein v. United States, 9 Cir., 1959, 266 F.2d. 579;
Lemon v. United States, 9 Cir., 1960, 278 F.2d. 369;
Chin Bick v. United States, 9 Cir., 1957, 245 F.2d. 274;
Goldbaum v. United States, 9 Cir., 1953, 201 F.2d. 71;
Wenger v. United States, 9 Cir., 1956, 233 F.2d. 430;
Cohen v. United States, 9 Cir., 1953, 201 F.2d. 386,
We can find nothing in the record to indicate that the sentences imposed under counts 2, 3 or 4 respectively would have been less severe if there had been no conviction under counts 5 and 9, or 8 and 10, or 13. On the contrary, these are, in a sense, subordinate counts, involving, as to counts 5, 8, 9 and 10, specific assets that were concealed, and, as to count 13, a false statement. Each represents one item in the great mosaic of facts which, in total, support counts 2, 3, and 4. Thus the case does not fall within such cases as Yates v. United States, 1957, 355 U.S. 66 and Bailey v. United States, 1895, 160 U.S. 187 or our decisions in Roberts v. United States, 1956, 239 F.2d. 467; Fuentes v. United States, 1960, 283 F.2d. 537 and Russell v. United States, 1961, 288 F.2d. 520.

to set forth the evidence in detail. Basically, counts 2 and 3 involve unreported income. Much of it was received by appellant in the form of loans, but, according to the government's theory, it was actually the product of fraud or extortion—"ill-gotten gains". A great many such transactions were proved, and they show, taken together, a fairly consistent pattern of behavior by appellant. Much of this evidence was also pertinent under count 4. It charged that appellant placed his assets in the name of others, deposited them with others, dealt in currency, caused his obligations to be paid through and in the name of others, caused moneys paid to him to be paid through and in the name of others, and paid other creditors but not the government, all for the purpose of defeating the payment of his income tax liabilities. Some was also pertinent under counts 5, 8, 9 and 10, which charged respectively, concealment of interests in two Cadillacs, a 12.69 carat diamond ring, and a collection of valuable jewelry. Some was also pertinent under count 13, which charged false representations that no person had any property or rights belonging to appellant, except his interest in his life story. Speaking broadly, we think that the government produced ample evidence to go to the jury on these questions. We will discuss relevant portions of the evidence in more detail in considering the questions raised by appellant.

1. *There was no prejudicial error in calling appellant's counsel as a witness.*

This contention relates to all counts. Appellant had but one attorney (Dahlstrum) throughout the trial. He had been called before the grand jury as a witness, and had given the government an affidavit as to certain facts. He was told by government counsel after the return of the indictment, but before he became sole trial counsel for appellant, that he would be called. When government counsel, outside the hearing of the jury, told the Court that he wished to call Dahlstrum, the latter made no objection; he only asked the Court to order him to testify, so that he might be still free to argue. The Court did so, saying that the only restriction would be that Dahlstrum not argue his own credibility. After his testimony, that restriction was removed. He testified on a Friday. The following Monday, he moved for a mistrial, which was denied. The ground was that

his credibility had been put in issue "as it affects the whole position of me as counsel for the defendant in the matter with the jury." The Court, in denying the motion, said, "I think in my judgment there is not the remotest possibility of any difficulty arising on account of it."

The Court was right. The actual testimony of Dahlstrum occupies only 14 pages in the transcript. No objections of any kind were made. No attack was made upon his credibility, either in the questions asked, or when the case was argued to the jury. His testimony established certain facts as to the manner of handling an advance by one Pomeranz to appellant, and a few other minor matters. It is significant, too, we think, that when Pomeranz testified, Dahlstrum told the Court that he would have to take the stand on appellant's behalf. This is a far cry from the situation in People v. Lathrom, 192 ACA 239, 13 Cal. Reptr. 325, 1961, upon which appellant relies.

We do not commend the practice of calling defendant's trial counsel as a witness in a criminal case. We think it probably could have been avoided here. On the other hand, the lips of a material witness who is also a lawyer should not be sealed merely because a defendant employs him as his counsel.

2. *The Court did not err in denying motions for mistrial based upon newspaper publicity.*

This contention, too, affects all counts. The trial began May 2, 1961; the jury was instructed on June 28. The jury was permitted to separate at the end of each session, until the matter was submitted to them, at which time they were locked up, and no objection was made to this procedure. There were four motions for mistrial. One was on May 10, based upon large front page headlines in the Los Angeles Examiner, captioning two juxtaposed articles. One reads: "2300 Tax Sleuths Asked; $7 Billions Missed", and heads an A. P. Washington release stating that the Treasury had requested an appropriation for 2300 more agents "to run down tax cheaters." The other reads: "Huge 'Long Green' Bank Deposits for Mickey Cohen Greenhouse Bared" and "Cohen Given $46,000 Loans, Court Told", this article relating to the trial. The second motion was on June 5, and was based upon articles, in two papers, about the shooting

of one Max Tannenbaum, described in headlines as "Cohen Pal" or "Friend". There were brief references in the articles to the case, and to the fact that Tannenbaum might have been a witness. The third motion was on June 17, based upon an article in the Los Angeles Mirror headed "Cohen Will Take Stand At Trial." The fourth motion was on June 29, based upon an article in the Los Angeles Times headed "Near $1 Million Cost Involved in Cohen Cases."

On the first day of the trial, and repeatedly thereafter,—the government says 69 times—the Court instructed the jury as to its duty not to read, see or look at anything—including specifically newspapers—relating to the trial. It did so forcefully on May 10, without referring to any particular article, and specifically asked the jury if they were following the admonition. It gave a similar admonition on June 5, and an emphatic one on June 16, when a recess was taken to June 20, and it gave its customary one on that day. As to the June 29 item, the record indicates that the case had been submitted to the jury when it appeared, and the Court questioned the bailiff in charge to make sure that they had had no chance to see the article in question. It also questioned the jury after the verdict was received.

There is no showing that any juror read or even saw any of the offending articles; it is merely urged that they must have seen them. To so hold, we would have to presume that the jurors disregarded repeated and emphatic instructions by the Court. The presumption is the other way. As Mr. Justice Holmes said in Holt v. United States, 218 U.S. 245, at p. 251: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

The matter was within the sound discretion of the trial judge; we cannot say that his judgment about it was wrong. (See Marshall v. United States, 360 U.S. 310, 312; Itow v. United States, 9 Cir., 1915, 223 Fed. 25; Madden v. United States, 9 Cir., 1927, 20 F2d. 289; Cohen v. United States, 9 Cir., 1953, 201 F2d. 386; Yates v. United States, 9 Cir., 1955, 225 F2d. 146, rev'd on other grounds, 354 U.S. 298).

3. The admission of testimony as to appellant's religious activities was not prejudicially erroneous.

This contention likewise affects the convictions under all counts. The evidence shows that Cohen, who had been previously convicted for income tax frauds, was well aware that money received as a loan or as a gift is not taxable income. It shows that during the years 1957 and 1958 he received very large sums of money from a remarkable variety of persons, rich and poor, prominent and obscure. It shows a studied attempt on his part to cast most of these transactions in the form of loans, many purportedly secured by "interests" in his life story, which he had already conveyed away in 1951 to one Gutman. The particular brand of magic that he used in obtaining these moneys does not always appear. That there was fraud involved in many instances is plain. Extortion appears in one or two.

Among those who advanced moneys to Cohen were an evangelist named Vaus and a business man, who was also an evangelist, named Jones. Their story begins with Vaus, author of a book entitled "Why I Quit Syndicated Crime." Vaus testified before Jones did. He advanced, to or for the account of Cohen, numerous sums of money, totalling not less than $2494.12 plus the use of a car, an office, a secretary, and credit cards. He also obtained at least $3,000 for Cohen from one Blythe. Cohen dictated part of his "life story" to Vaus' secretary. In the course of testifying, Vaus mentioned telling Cohen of the latter's need for a "complete severance from the things of the past and a positive identification with God through Jesus Christ." He described how, in September of 1956, and at the request of Jones, he arranged for Cohen to meet the evangelist Billy Graham in New York. In connection with a previous meeting between himself, Graham and Cohen, he said that Graham had told Cohen that the latter's need was for a relationship with God, and that many people were praying for him. There was no objection to any of Vaus' testimony.

Jones became interested in Cohen along with Vaus. He, too, advanced substantial sums to or for the account of Cohen—at least $4,000.00. He testified that in November, 1955, at Vaus' suggestion, he met with Vaus and Cohen, at which meeting, being himself a convert, he discussed the possibility of a similar miracle

for Cohen. At this point, out of the jury's hearing, counsel for Cohen objected that the testimony was prejudicial, offering to stipulate to the amount of money received from Jones. Government counsel stated that Cohen was "involved in a confidence game to obtain money from these people." The Court, in effect, overruled the objection, but directed counsel to avoid going into more detail than necessary.

The witness then described another meeting with Cohen, following which he and Cohen prayed together, and Cohen "turned his life over to Christ." No further objection was then made. Jones then testified to numerous advances to Cohen. This was followed by testimony about his and Vaus' arranging the Graham meeting in New York, all of which was financed by Jones. Defense counsel then suggested to the Court that he was in a difficult position, and did not want to be in the position of objecting. The Court again directed Government counsel to shorten the matter. Cohen's counsel's statement was hardly an objection. The New York-Graham meeting matter was then described, not as to Cohen's beliefs, but as to his behavior, which was certainly not that of a convert. Counsel did object, on the ground of irrelevancy and immateriality. The testimony then returned to money matters. On the morning of the next trial day, counsel moved to strike the testimony as unduly prejudicial. This was denied.

The only other incident mentioned in Cohen's briefs is in the testimony of a Dr. Krause, who "douned" Cohen $25,000 on the "security" of an interest in Cohen's life story. Over objection, he testified to the fact that there was a religious observance at Krause's home on an occasion when Cohen was there and introduced Krause to one Sica.

It is urged that allowing this testimony invaded Cohen's right to freedom of religion under the First Amendment, and, if it did not, was still prejudicially erroneous. We do not agree. In the first place, the First Amendment point was never raised in the trial court. (See Rule 18(2), (d), rules of this court.) Moreover, the way of the confidence man would be easy if he could obtain money from the religious by willfully false protestations of belief and then, when brought to book, take refuge in the First Amendment. We are cited to no case upholding Cohen's contention. United States v. Ballard, 322 U.S. 78, does not. It

does hold that the validity or veracity of a religious doctrine cannot be inquired into by a Federal Court, stating "that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents" (p. 88). It does not hold that a court or jury cannot decide that the profession of a belief is fraudulent. What the District Court had submitted to the jury was "Did these defendants honestly and in good faith believe these things?" The Supreme Court did not hold that this was improper. Only Justice Jackson would have gone as far as counsel now urge us to go. So here—nowhere, either in argument or in the court's instructions or elsewhere in the record is there any intimation that the jury was to pass upon the truth or falsity of Christian or Jewish doctrines that Cohen may have professed to believe.

Here, the religious incidents were a minor part of a very voluminous record, and they did not relate directly to any of the specific sums upon which the government's case under counts 2 and 3 was founded. Vaus' and Jones' testimony did show that Cohen got moneys from them, which he could have used to pay his taxes, pertinent under count 4, and did show a callous disposition to obtain money by fraud, pertinent under counts 2 and 3.

In *Ballard*, the whole case involved religious beliefs. In this case, the religious "issue" was minor and incidental to a showing of wholesale frauds and some extortion, entirely unconnected with religion, and to a showing that Cohen did have money to pay taxes at a time when he professed to have nothing. We cannot conceive that the result would have been different if the testimony as to religion had not been presented.

Nor do we find here the deliberate use of religion to prejudice the jury of which counsel was guilty in the other cases on which Cohen relies. (See Skuy v. United States, 8 Cir., 1919, 261 F. 317 and Ross v. United States, 6 Cir., 1950, 180 F2d. 160)

4. *The claim that the court erred in refusing to instruct upon lesser included offenses is not properly brought before us.*

This claim affects counts 2, 3 and 4. Three instructions, numbers 37, 49 and 56, were proposed. The court did not give them.

Rule 18, 2. (d) of the rules of this court requires that the specification of error in the brief "shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial." This has not been done. We might be disposed to overlook this failure to comply with our rules, in view of the voluminous record and the short time within which the opening brief was required to be filed. (But see Kobey v. United States, 1953, 208 F2d. 583, 587-8; Percifield v. United States, 1957, 241 F2d. 225; Benatar v. United States, 1954, 209 F2d. 734; Gordon v. United States, 1953, 202 F2d. 596)

But there is a more serious difficulty. At the trial, counsel for Cohen did not comply with Rule 30, F.R.Crim.Proc., which states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Counsel for Cohen proposed some eighty-three different instructions. The court meticulously followed Rule 30. Five days before the jury was instructed, the Court handed to the attorneys and filed an "advice to counsel", in writing, stating which instructions it would give and which it would refuse. Of Cohen's instructions, it "refused" ten and listed fifty-seven as "covered", including the three now in question. As to these, it stated "Defendant's 37, 49 and 56 all relate to lesser included offenses. The jury will be instructed that if they find defendant merely and only wilfully failed to report or pay tax or keep records, etc., without specific intent to evade, etc., acquittal is required."

In essence, instruction 37 would tell the jury that the offense defined in 26 U.S.C. §7203 is a lesser included offense within 26 U.S.C. §7201, the latter section being the basis for counts 2, 3 and 4. This is the only one of the three instructions proposed that is now urged upon us. Numbers 49 and 56 would have told the jury that the offense defined in 26 U.S.C. §7203 is a lesser included offense within 26 U.S.C. §7206(4), the basis for counts 5, 8, 9 and 10, but no such claim is now made.

After the court had charged the jury, counsel said "I am not specifying any particular part of the charge, . . . but merely

wish at this time to object to the failure to give all requests made by the defendant, specifically enumerated and set forth as having been refused in the advice to counsel . . . filed in the case . . . I will refer to those portions of that document which state which of defendant's instructions were refused, and I object to them as having been refused." No specific reference was made to instructions 37, 49, and 56. They were not listed by the court as "refused", but as "covered". There was no objection to the court's failure to give the instructions that it designated as covered. Nothing that counsel said in any way called the court's attention to those listed as covered.

Moreover, no grounds for objection were stated. The court evidently felt that its instructions were more favorable than requested instruction 37, in that, in substance, they would require acquittal if all that the jury found was an offense of the type described in 26 U.S.C. §7203. It was entitled to think that counsel felt the same way, absent a specific objection, stating grounds. Counsel having elected to gamble, under the court's instructions, upon an acquittal, is not now in a position to ask us to give him a new chance at conviction of a lesser included offense.

We have repeatedly applied and enforced Rule 30.[2] This is not, in our opinion, an instance of plain error or a defect af-

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[2] Nemec v. United States, 1949, 178 F2d. 656;
Ziegler v. United States, 1949, 174 F2d. 439;
Enriquez v. United States, 1951, 188 F2d. 313;
Kobey v. United States, 1953, 208 F2d. 583;
Mitchell v. United States, 1954, 213 F2d. 951;
Bateman v. United States, 1954, 212 F2d. 61;
Benatar v. United States, 1954, 209 F2d. 734;
Herzog v. United States, 1955, 226 F2d. 561;
Brown v. United States, 1955, 222 F2d. 293;
Herzog v. United States, 1956, 235 F2d. 665;
Percifield v. United States, 1957, 241 F2d. 225;
Pool v. United States, 1958, 260 F2d. 57;
Davenport v. United States, 1958, 260 F2d. 591;
Harris v. United States, 1958, 261 F2d. 897;
Holt v. United States, 1959, 272 F2d. 272;
Bieber v. United States, 1960, 276 F2d. 709;
Ryan v. United States, 1960, 278 F2d. 836;
Cooper v. United States, 1960, 282 F2d. 527;
Claypole v. United States, 1960, 280 F2d. 766.

fecting substantial rights under Rule 52(b).[3] Trial counsel frequently prefer to gamble as counsel did here. Their choice does not produce prejudicial error if they lose. Under the circumstances, we do not decide whether proposed instruction 37 is a correct statement of the law.

5. The evidence sustains the verdict as to counts 2 and 3.

Essentially, appellant's argument under this heading is one that should have been, and was, addressed to the jury. There is ample evidence from which the jury could conclude that the moneys which appellant admittedly received, and which form the basis for counts 2 and 3, were not gifts or loans, although most of them were carefully so labeled by appellant, but were of several types: (1) compensation for promoting a book called "Gus the Great"; (2) compensation for promoting the career of an aspiring singer; (3) interest; (4) compensation for settling a row between some vending machine operators; (5) moneys obtained from Jones by trick; (6) moneys obtained from one Stemler by trick, and (7) "life story income". Items (1) to (6), which all relate to count 2 (the year 1957), total $14,150. "Life story income" for that year was at least $32,500, and for 1958 was at least $56,200.00. Only this type of income is involved in count 3 for 1958. Appellant attacks only the evidence relating to "life story income" for the two years in question, and cites, in his brief, only certain portions of the evidence favorable to him. It would unduly prolong this opinion to discuss the evidence. We have examined the portions cited by the government, and such additional portions as we deem necessary to convince us that there was ample evidence to sustain a finding that all such income was obtained by fraud and that a substantial part of it was also obtained by extortion. Appellant's explanations are incredible to us; no doubt they were equally incredible to the jury.

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[3] See: Benatar v. United States, 1954, 209 F2d. 731;
Mitchell v. United States, 1954, 213 F2d. 951;
Herzog v. United States, 1956, 235 F2d. 661;
Pereifield v. United States, 1957, 241 F2d. 225;
Pool v. United States, 1958, 260 F2d. 57;
Holt v. United States, 1959, 272 F2d. 272;
Bieber v. United States, 1960, 276 F2d. 769;
Ryan v. United States, 1960, 278 F2d. 836.

6. ***The court did not err in refusing appellant's proposed instructions as to the California law of theft.***

This contention relates only to counts 2 and 3. Appellant's proposed instructions (63, 74-80 inclusive) would first have told the jury that the government was charging him with committing certain crimes under state law, and that it must prove the commission of those crimes beyond a reasonable doubt, and would then have defined the crimes. California subsumes various common law crimes under the general head of "theft". (West's Ann. Calif. Pen. Code, §§ 484 ff) The definitions proposed relate to larceny by trick and device, embezzlement, and false pretenses.

The court did define embezzlement, and told the jury that embezzled moneys are not taxable income. It is not claimed that the court's definition was erroneous. We therefore do not consider appellant's proposed instruction 75.

As to the others, they were designated by the court in its "advice to counsel" as "refused"; so it can be said that counsel did specifically object to them. But he did not, as required by Rule 30, F.R. Crim. Proc., "state distinctly the [or any] grounds of his objection." (See discussion under heading 4, supra.)

The "grounds", however, might be said to be apparent from the instructions themselves, and we will therefore consider the question. We think there is nothing in the point. The government was not trying to prove crimes under the laws of California (or, for that matter, of New York or Illinois or Ohio or Florida, where some parts of some transactions occurred). It was trying to prove the receipt by appellant of income which appellant wilfully failed to report. As is stated in Davis v. United States, 6 Cir., 1955, 226 F2d. 331, at p. 334:

> "[T]he gains to the recipient which are subject to taxation may not only be unlawful gains of a civil nature, but may also be unlawful gains of a criminal nature."

and again, at p. 335:

> "Appellant makes much of the fact that the government has not fixed a label of some kind on the funds that he took from his corporation. It is not necessary to describe them as additional salary, illicit bonuses, or commissions,

or anything more than wrongful diversions, since, as above mentioned, substance controls over form, and taxation is concerned with the actual command over the property taxed."

See also Wallace v. United States, 4 Cir., 1960, 281 F2d. 656, 664; Dawkins v. Commissioner, 8 Cir., 1956, 238 F2d. 174.

The law defines gross income as including "all income from whatever source derived" (26 U.S.C. §61). Gifts are excluded (26 U.S.C. §102), and the court so told the jury. Loans, (i.e., borrowed moneys) are excluded as not being "income", and the court so told the jury. The court told the jury that "[t]he tax is imposed on gains or income whether acquired in a lawful or in an unlawful manner". It then specifically excluded embezzled moneys and "the proceeds of bona fide loans and gifts". This, we think, was correct. The Federal law defines income and is not dependent for its effect upon whether income so defined is received in violation either of a civil obligation to some individual imposed by the law of a state, or of a criminal law of a state, or of both or neither. (Marienfeld v. United States, 8 Cir., 1954, 214 F2d. 632, 636; Daine v. Commissioner, 2 Cir., 1948, 168 F2d. 449, 451, and cases there cited.

The proposed instruction 63 would have placed upon the government the burden of proving, beyond a reasonable doubt, that Cohen had committed the crimes described in detail in proposed instructions 74, 76, 77, 78, 79 and 80. The government had no such burden. The injection into the instructions of the definitions of California crimes could only have confused the jury; their rejection was correct.

7. *Moneys obtained by fraud were taxable in the years in question (1957 and 1958).*

This contention likewise affects only counts 2 and 3. It has long been held that gains unlawfully obtained are taxable income. (See, e.g., United States v. Sullivan, 1927, 274 U.S. 259. And this rule has repeatedly been applied to moneys obtained by various frauds. (Akers v. Scofield, 5 Cir., 1948, 167 F2d. 718; Rollinger v. United States, 8 Cir., 1953, 208 F2d. 109; Kann v. Commissioner, 3 Cir., 1953, 210 F2d. 247. Marienfeld v.

United States, 8 Cir., 1954, 214 F2d. 632; Briggs v. United States, 4 Cir., 1954, 214 F2d. 699; Berra v. United States, 8 Cir., 1955, 221 F2d. 590; Davis v. United States, supra, 6 Cir., 1955, 226 F2d. 331; cf. United States v. Bruswitz, 2 Cir., 1954, 219 F2d. 59; United States v. Wyss, 7 Cir., 1957, 239 F2d. 658.)

The only exception to this general rule to which our attention has been called is Commissioner v. Wilcox, 1946, 327 U.S. 404, which held that embezzled moneys are not taxable income. It was overruled in James v. United States, 1961, 366 U.S. 213, by a majority of 6 to 3. In the meantime, and long before the taxable years here in question, the Supreme Court had decided, in Rutkin v. United States, 1952, 343 U.S. 130, that moneys obtained by extortion were taxable income. In its opinion in *Rutkin*, the court re-asserted the principle that "[a]n unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it" (p. 137). It also said: "There is little doubt now that when unlawful gains are secured by the fraud of the taxpayer they are taxable". (p. 138) And it expressly limited *Wilcox* "to its facts".

In sum, then, at the times here in question, the law was that all unlawful gains, including those procured by fraud and extortion, were taxable, with but one exception—embezzled money (an exception later eliminated in *James*). The Supreme Court itself made this clear in *Rutkin*.

Nor can appellant successfully assert, in the face of the record in this case, that he had doubt as to whether his ill-gotten gains were taxable, because, forsooth, neither the Supreme Court nor this court had directly decided that income includes the proceeds of fraud. The record would support a finding that he knew that such gains were taxable, and that he deliberately arranged his affairs so as to make them appear to be loans. (See Spies v. United States, 1943, 317 U.S. 492 and the concurring opinion of Mr. Justice Harlan in *James*, supra, at pp. 242-4.) For obvious reasons, he did not arrange them to appear to be embezzlements.

The foregoing are all of the contentions raised that affect counts 2 and 3. Since we have found them to be unavailing

we do not consider appellant's contentions that relate only to counts 5, 8, 9 and 10, because the sentences upon counts 5, 8, 9 are concurrent with the sentence under count 2, and those under counts 8 and 10 are concurrent with that under count 3. See footnote 1, supra.

8. *Cohen has not been placed in double jeopardy.*

This contention affects count 4. The record shows that Cohen was convicted, in 1951, on three counts of an indictment which charged willful attempt to evade and defeat income tax for the respective years 1946, 1947 and 1948, by filing false tax returns in violation of Section 145(b), 1939 I.R.C. Cohen v. United States, 201 F.2d 386. Necessarily, all of the evidence on the basis of which he was convicted must have related to a period antedating the conviction. In this case, it is charged in count 4, that: "[o]n[m]encing on or about the 10th day of October, 1955 . . . Cohen did wilfully and knowingly attempt to evade and defeat the payment of income taxes then due and owing . . . for the years 1945 to 1950, inclusive, and duly assessed against him as follows: . . ." All of the evidence in the present case concerns the period beginning October 10, 1955.

Section 145 (b), 1939 Code and Section 7201 (1954 Code) both make one guilty of an offense who "willfully attempts in any manner to evade or defeat *any tax* imposed by this chapter *or the payment thereof* . . ." (emphasis added). The government says that a willful and knowing attempt to evade the *payment* of tax is different from a willful and knowing attempt to evade and defeat the *tax*. There is support for this position in the disjunctive form in which the statute is cast. There are also practical reasons for giving the statute a disjunctive effect. The income tax law is one under which the taxpayer is required to assess himself. This is the first, and fortunately in most cases the final, means by which the amount of tax owing is determined. One can thus evade and defeat the tax by a combination of such things as failing to file a return, filing a false return, failing to keep records, concealing income, or other means. (Spies v. United States, 317 U.S. 492, 499). These things can evade or defeat the tax in the first instance by preventing an assessment of it, either by the taxpayer or by the Commissioner. Practically

these are the kinds of things that Cohen did and for which he was convicted in 1951. The Commissioner assessed the taxes *after* he was convicted. Over four years later, beginning when he was released from prison, Cohen set about obtaining large sums of money, and by the various means listed in the present indictment, seeing to it that none of that money went to pay the taxes so assessed. That is what he was convicted of doing in 1961. Surely the two offenses are not necessarily the same.

The precise distinction that we have in mind, between evading and defeating the tax and evading and defeating its payment, was made by the Court of Appeals for the Second Circuit in United States v. Mollet, 1961, 290 Fed.2d 273, 274. Cf Wilson v. United States, 9 Cir., 1957, 250 F2d. 312, 318; United States v. Bardin, 7 Cir., 1955, 224 F2d 255, 259-60. None of these cases decides the question now before us, but each of them does recognize that the statute, or one containing the same language, does define at least two separate crimes, viz., attempt to evade or defeat tax and attempt to evade or defeat payment of tax.

Moreover, even if we assume that but one crime is defined, the result would be the same. The question was presented and decided adversely to appellant by this court in Norwitt v. United States, supra, 195 F2d. 127, at p. 133, where we said:

> "The appellant correctly states that 'An attempt to evade a tax and the payment thereof is not a continuing offense.' His error, however, occurs in the sentence immediately following: 'While there may be such a crime in each year for which an income tax is due, once the attempt has been consummated by the filing of a false and fraudulent return in any particular year, the offense has been completed for that year, and nothing done thereafter to carry out the initial unlawful purpose for such year can constitute a new offense.'
>
> "The appellant's argument can be reduced to an absurdity. A man attempts to assassinate the President of the United States on January 1, 1952. He escapes arrest, and tries the same thing the next day. He keeps up this record of poor marksmanship and swift flight for every one of the 365

days of the year. Is he guilty of but one attempt against the President's life—or of 366?

"The analogy with several attempts to evade all or part of a tax for the same year is complete. In the one case, the missed target is the same human being; in the other, the public purse for the same year."

This case graphically illustrates the validity of the foregoing reasoning. Here, Cohen's prior convictions were for conduct occurring before June, 1931, while the present conviction is for entirely different conduct, occurring after October 10, 1935. See Morgan v. Devine, 1915, 237 U.S. 632; Albrecht v. United States, 1927, 273 U.S. 1; United States v. Noveck, 1927, 273 U.S. 202. Thus, the evidence that is required to sustain the present conviction must, on the face of the matter, be different from that required to sustain the prior convictions.

9. The court correctly ruled that taxes had been duly assessed against Cohen for the years 1945 to 1950, inclusive.

This contention involves counts 4, 5, 8, 9 and 10. Essentially the contention is that the so-called 90-day letters, required by Section 272 of the 1939 Internal Revenue Code[4] were not sent to Cohen by registered mail "*at his last known address.*" The court ruled, as a matter of law, that the notices had been so mailed, and instructed the jury that the assessments were valid. The point has been properly preserved so that we are required to consider it.

Count Four charges that, "commencing on or about the first day of October, 1955 and continuing to the return of this indictment [Sept. 16, 1960] . . . Cohen did wilfully and knowingly attempt to evade and defeat the payment of income taxes then due . . . for the years 1940 to 1950, inclusive, and July assessed against him as follows: (1) on July 12, 1951, in the amount of $62,976.98 as to the years 1945 to 1947, inclusive. (2) On July 12, 1951, in the amount of $58,988.04 as to the

[4] All references to the statute are to the Internal Revenue Code of 1939, unless otherwise noted.

year 1948, and (3) on November 1, 1952, in the amount of $13,882.92 as to the years 1949 and 1950 . . ." by means heretofore outlined in this opinion.

Thus the amount involved for the years 1945-8, inclusive, is $121,965.02 and for the years 1949 and 1950, $13,882.92, a total of $135,847.94. These figures do not include interest and penalties. They give credit for payments totalling $310, made before October 10, 1955. There were none thereafter. The record amply demonstrates that during the years 1955-60 well over $350,000 was available to Cohen and that, in spite of efforts by the government to collect, he successfully and willfully evaded and defeated the payment of any part of the assessments, by all of the means listed in the indictment and by other means as well. Meanwhile, he lived and spent money lavishly.

The facts as to the assessments are not disputed. Jeopardy assessments (§273(a)) as to the years 1945, 1946, 1947 and 1948 were made on July 12, 1951. The next day, July 13, notice and demand for payment were personally served upon Cohen, who was then in the Los Angeles County Jail. He was there because, on June 10, he had been found guilty on charges of willful attempt to evade income taxes for 1946, 1947 and 1948, and had been sentenced on July 9 to five years. An appeal and a petition for admission to bail were pending. For some years Cohen had been married to LaVonne Cohen, and they had lived in a residence at 513 Moreno Avenue, Los Angeles 49, California. This was the address given on their joint returns for 1948, 1949 and 1950. The prior returns involved were separate.

Within 60 days after July 13, 1951 (see §272(b)), notices —90-day letters (see §272(a) and (k))—were mailed to Cohen at the Moreno Avenue address. This was done on August 9, 1951. One letter, addressed to Cohen alone, related to the years 1945-7; another, addressed to Cohen and his wife, related to the year 1948. On August 9, the Moreno Avenue home was still the home of the Cohens, and the wife was living there. The Internal Revenue Agent knew that Cohen was still in the Los Angeles County Jail, but the Commissioner had not been notified by either spouse that separate residences had been established. (See §272(a)).

The 90-day letter, as to the years 1949 and 1950, was mailed to the Cohens on May 8, 1952, at the Moreno Avenue address. There was no jeopardy assessment for these years. The assessments were made on October 9, 1952. On May 8, 1952, Cohen was in the Federal penitentiary at Alcatraz, and his wife was no longer at the Moreno Avenue residence, having left it the preceding September. Cohen's appeal was still pending. Again neither spouse had notified the Commissioner that separate residences had been established. There is no evidence that government agents knew that Mrs. Cohen was no longer living at the Moreno Avenue residence. Undoubtedly the Internal Revenue Agents knew that Cohen was at Alcatraz.

Each letter was sent by registered mail, and was not returned to the government. Return receipts were not requested. There is no direct evidence that Cohen either did or did not receive the letters, although both Cohen and his former wife (they were later divorced) testified. When the letters were sent, the address on Moreno Avenue was the last address appearing in the accumulative file on Cohen's tax liabilities that was used by the employee of the Commissioner who prepared the letter.

Neither side asked the Court to submit the question of the validity of the assessments to the jury. The government maintained that, as a matter of law, they were valid, the defendant that they were not. The applicable statute states that "the Commissioner is authorized to send notices of such deficiency to the taxpayer by registered mail". 272 (a). The same statute also provides: "In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address." Subsection (k) of section 272 provides: "In the absence of notice to the Commissioner under section 312 (a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence."

We think it clear that the Congress, when it "authorized" service by registered mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt. Failure to petition the Board of Tax Appeals (now the Tax Court) within 90 days of the mailing of the letter does deprive the taxpayer of a privilege, namely, withholding payment of the tax pending determination of the validity and correctness of the assessment by the Board (Tax Court) (§272(a)), and litigating the matter before the Board (Tax Court). (See Ginsburg v. United States, 1 Cir., 1960, 278 F2d. 470.) But it does not deprive him of all right to contest the validity or correctness of the assessment; he can still do this by paying the tax, filing a claim for refund, and if that be denied, suing in the District Court or Court of Claims. (e.g. Van Antwerp v. United States, 9 Cir., 1937, 92 F2d. 871.) And if he wins, he gets his money back, normally, with interest. We have no doubt that the Congress, if it chose to do so, could have required the taxpayer to pay first and then litigate, in all cases. (Phillips v. Commissioner, 283 U.S. 589, 1931.) Particularly because this is so, we find no constitutional weakness in the use of the authorized method of sending the 90-day letter, even in those cases where it may not actually be received. The cases cited by appellant (Mullane v. Central Hanover Bank & Trust Co., 1950, 339 U.S. 306; Walker v. City of Hutchinson, 352 U.S. 112) deal with the cutting off of all rights, not of one of two alternative remedies provided to the taxpayer by the Congress as a matter of grace.

The statute, however, requires a proper giving of notice. (§272(a)).[5] We think that the letters relating to the years 1945-7 and 1948 were in fact and in law sent to Cohen's "last known address." The Commissioner normally deals with a taxpayer who has a residence or other address which is on record with the Commissioner through the taxpayer's own tax returns. That is the situation here. The Commissioner or one of his agents may learn that the taxpayer has changed his address, or he may be so advised by the taxpayer. In such a case, he must use the

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[5] Steiner v. Nelson, 7 Cir., 1958, 259 F2d. 853;
United States v. Williams, DC ED NY, 1958, 161 F.Supp. 156.

new address. The Commissioner or one of his agents may also learn that the taxpayer is temporarily sojourning elsewhere, as in a hotel or hospital or vacation resort or jail, or even abroad, while still retaining the same "permanent" address. He is not required to treat the address of temporary sojourn as the "last known address". To so require would place an impossible administrative burden on the Commissioner. More important, it could in many cases defeat the objective of the statute by making it less rather than more likely that a letter mailed to the taxpayer would be received. This is because the taxpayer may no longer be at the temporary address when the letter is mailed. The Commissioner can hardly make a daily check to see when the taxpayer may leave such temporary address.

In a sense, Cohen had two addresses on August 9, 1951. One was of a permanent character—his residence. The other was temporary, so far as the Commissioner then knew—the jail. We think that, absent a designation by Cohen to the Commissioner of the jail as his "address", the Commissioner properly treated the residence as his "address". The use by the Congress of the word "residence" in relation to joint returns strengthens this view.

In the case of the 1948 letter, another factor sustains the validity of the mailing. The return for that year was joint. The Moreno Avenue address was admittedly still Mrs. Cohen's address—and residence. The Commissioner had not been notified that "separate residences", (the words used by the statute) had been established. The mailing was therefore in exact and literal compliance with the statute. The liability being joint, and the normal relationship between spouses being close, Congress could well consider that receipt of the notice by either spouse would be well calculated to give actual notice to both, even though one spouse may be temporarily absent.

There is another reason why the assessments for 1945 through 1948 were valid, at least sufficiently to sustain a conviction of wilfully attempting to evade and defeat their payment. They were jeopardy assessments. Section 273 authorizes the making of such assessments, and provides in subdivision (f) that the taxpayer may stay collection by giving a bond in the manner prescribed in that subsection. We particularly note that the section

requires that the bond be given "within ten days after notice and demand from the Collector for the payment of the amount of the assessment", not within any time limited upon or affected by the mailing of a 90-day letter under Section 272(a). It is clear that unless the bond is given, the Commissioner may proceed to collect by legal process, even though a proceeding is pending for review of the assessment in the tax court. In other words, the provisions of Section 272(a) restricting the assessment and collection of deficiencies do not apply to a jeopardy assessment. It follows that the only purpose of the 90-day letter which is to be sent after the making of a jeopardy assessment (Section 273(b)), is to start the time running within which the taxpayer can petition the Board of Tax Appeals and to limit that time. (cf Mason v. Commissioner, 5 Cir., 1954, 210 F2d. 388) If we were of the opinion (which we are not) that the deficiency letters for the years 1945-48 were improperly addressed, this would not mean that the jeopardy assessments are invalid. The law is clear that in the case of such assessments a proceeding before the Board of Tax Appeals does not stay the Commissioner's hand and that he can not be enjoined from enforcing the assessment. It is equally clear that this provision of the law is constitutional. (Continental Products Co. v. Commissioner, 1 Cir., 1933, 66 F2d. 434; Dyer v. Gallagher, 6 Cir., 1953, 203 F2d. 477; Darnell v. Tomlinson, 5 Cir., 1955, 220 F2d. 894; Lloyd v. Patterson, 5 Cir., 1957, 242 F2d. 742; Melvin Building Corporation v. Long, 7 Cir., 1958, 262 F2d. 920; Ginsburg v. United States, 1 Cir., 1960, 278 F2d. 470)

Cohen admittedly received, by personal delivery to him, the notice and demand specified in Section 273(a). He did not give the bond required to stay collection by Section 273(f). Thus, even though his time to petition the tax court may not have expired, the Commissioner had the right and still has the right to enforce payment of the assessment. It was this payment that Cohen was convicted of wilfully attempting to evade and defeat under count 4. His obligation to pay upon receipt of notice and demand is stated in Section 6155 of the 1954 Code, which was in effect during all of the years (1955 to 1960) when he was wilfully attempting to evade and defeat it. A similar obligation was, of course, imposed by the 1939 Code. (See Sections 272(a), 273(a), (g) and (i))

The foregoing, however, does not apply to the 1949-50 taxes. There was no jeopardy assessment for those years. When the 1949-50 letter, which also related to joint returns, was mailed, the situation had changed in two respects. Cohen was then in ~~Alcatraz~~, his applications for bail having been unsuccessful. Mrs. Cohen no longer lived on Moreno Avenue, but there is no evidence that the Commissioner knew this nor had either spouse notified him of the establishment of "separate residences". The Commissioner's knowledge that Cohen was in ~~Alcatraz~~ was not knowledge that Cohen and his wife had established "separate residences". One does not change his residence to the prison by virtue of being incarcerated there. (American Surety Co. v. Cosgrove, 81 N.Y.S. 945; Metropolitan Life Ins. Co. v. Jones (Ark.), 97 S.W.2d 64, 66; United States v. Gronich, D.C.W.D.Wash., 211 Fed. 548; Neuberger v. United States, 2 Cir., 1926, 13 F2d. 541, 542-3 and cases there cited). Thus, again, when the Commissioner sent the notice to Moreno Avenue, he was in literal compliance with the statute.

In addition, even if the 1949-50 assessment were invalid, that would not invalidate the conviction. The evidence clearly shows an attempt—wholly successful—to evade and defeat the payment of *any* taxes for the five years in question. We cannot believe that the result would have been affected in the slightest if the Court had told the jury that the 1949-50 assessment was void and to be disregarded. Those years involved only $13,882.92 out of a total of $135,847.94 in taxes.

The cases upon which Cohen relies are not contrary to the decision here made. Our decision in Buren v. Riddell, 1957, 241 F2d. 670 holds that a 90-day letter served upon the taxpayer by ordinary mail is effective if the taxpayer actually receives it. There is language in the opinion from which it might be inferred that actual receipt is necessary even where the letter is sent by registered mail to the correct address, but this question was not before the Court, and the opinion expressly limits the decision to the facts presented. Commissioner v. Stewart, 6 Cir., 1951, 186 F2d. 239, is similar. There, notice was sent to the taxpayer's attorney and the taxpayer petitioned the Tax Court within 90 days thereafter. It was held that the purpose of the statute had been accomplished. In Dolezilek v. Commissioner, D.C. Cir., 1954,

212 F2d. 458, notice was mailed to a correct address, but returned to the government. The government then caused it to be personally served on the taxpayer. It was held that the 90-day period started with the time of mailing. The holding supports our conclusion. The dissent, cited by us in *Boren*, would have the 90-day period begin with the actual delivery of notice. We came to the latter conclusion in Tenzer v. Commissioner, 1960, 285 F2d. 956. In that case notice was sent by registered mail and returned to the government; personal service of notice was then made. We concluded, citing *Boren* and the dissent in *Dolezilek*, that the 90 days ran from the time of personal service, basing our holding on considerations of fairness, and stating: "when the Commissioner chose personal service, he abandoned the other method." (p. 958) We also said: "we also hold when the notice was correctly addressed, registered and mailed that the first notice was not wholly void. (For example, it was probably good enough to arrest the statute of limitations.)." (p. 958) Apparently, we had not made up our minds as to which date should govern when we decided Rosewood Hotel, Inc. v. Commissioner, 1960, 275 Fed.2d. 786. We did so in *Tenzer*. But all of these cases deal with the time when the 90-day period starts; in each of them notice had actually been received. None decides what the correct rule is when notice is sent, by registered mail, to the last known address of the taxpayer, and not returned to the government, and when that is the only notice given. Barack v. United States, DC Mo., 1956, 56-2 USTC Par. 9961, cited by Cohen, dealt with a prisoner incarcerated under a final judgment, and in any event, is not binding on us.

The cases that do deal with this question hold that the notice is sufficient. cf Pfeffer v. Commissioner, 2 Cir., 1959, 272 F2d. 383; cf Williams v. United States, 6 Cir., 1959, 264 F2d. 227; see Clark's Estate v. Commissioner, 2 Cir., 1949, 173 F2d. 13; Gregory v. United States, Ct.Cl., 1944, 57 F.Supp. 962. (*Gregory* is criticized in our decision in Maxfield v. Commissioner, 1946, 153 F2d. 325, insofar as it decided that a particular address was the last known address, but the facts of that case were very different. Here it is clear that the Moreno Avenue address was the last known permanent or residence address of Cohen. We did not hold in *Maxfield*, or in any other decision, either that mailing

to such an address is insufficient, or that there must be, in the case of such mailing, affirmative proof that the taxpayer actually received the letter. The legislative history, cited in *Gregory*, makes it clear that Congress did not intend such a requirement.)

No other contentions are made that relate to count 4. We therefore do not consider contentions relating to count 13, because the sentence under that count is concurrent with that under count 4. (Note 1, supra)

When sentencing Cohen, the Court made the following statement:

> "[T]he record shows that within a very short time of his release, Mr. Cohen was in full flight on a profligate style of living financed by many fraudulent or extorted so-called 'loans' in a very large aggregate amount. The fact that the defendant ingratiated himself into a least a speaking acquaintance with a number of prominent and respectable people and that he used them and their names in effecting his frauds does not minimize his misconduct in which neither religion, patriotism or friendship, nor human kindness, sorrow or fear were excepted by Mr. Cohen as a means toward his unprincipled ends.
>
> "The evidence shows, to my mind with shocking clarity, that Mr. Cohen has not, and will not, pay any income taxes he can evade and defeat. Living on the luxury of the land, available to only a fortunate few of our people, Mr. Cohen has no notion of contributing anything to the cost of defending or maintaining the land affording him that luxury."

We agree.

The judgment is affirmed.

(Endorsed) Opinion Filed Jan. 12, 1962.

Frank H. Schmid, Clerk.

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APPPENDIX "B."

Judgment.

United States Court of Appeals for the Ninth Circuit.

Meyer Harris Cohen, aka Michael "Mickey" Cohen, Appellant, vs. United States of America, Appellee. No. 17503.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 12, 1962.

APPENDIX "C."

Section 272 of the Internal Revenue Code of 1939 (former 26 U. S. C. 272; 53 Stat. 82, amended by 56 Stat. 876 and 59 Stat. 673) provided:

"[(a)(1) Petition to The Tax Court of the United States.] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with The Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice

must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

"[(b) Collection of deficiency found by Tax Court.] If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

"(c) Failure to file petition. If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

"(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

"(e) Increase of deficiency after notice mailed. The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even

if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

"(f) Further deficiency letters restricted. If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section, relating to assertion of greater deficiencies before the Tax Court, or in section 273 (c), relating to the making of jeopardy assessments. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered (for the purposes of this subsection, or of subsection (a) of this section, prohibiting assessment and collection until notice of deficiency has been mailed, or of section 322 (c), prohibiting credits or refunds after petition to the Tax Court) as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall

assessment or collection be prohibited by the provisions of subsection (a) of this section.

"(g) Jurisdiction over other taxable years. The Tax Court in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

"[(h) Final decisions of Tax Court.] For the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

"(i) Prorating of deficiency to installments. If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in section 273 (relating to jeopardy assessments), that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

"(j) Extension of time for payment of deficiencies. Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof

will result in undue hardship to the taxpayer the Commissioner, under regulations prescribed by the Commissioner, with the approval of the Secretary, may grant an extension for the payment of such deficiency for a period not in excess of eighteen months, and, in exceptional cases, for a further period not in excess of twelve months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension. No extension shall be granted if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

"(b) Address for notice of deficiency. In the absence of notice to the Commissioner under section 312(a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence."

Section 273 of the Internal Revenue Code of 1939 (former 26 U. S. C. 273; 53 Stat. 84, Amended by 67 Stat. 583) provided:

"(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with

all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

"(b) Deficiency letters. If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

"[(c) Amount assessable before decision of Tax Court.] The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 272(f) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Commissioner may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Commissioner shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

"[(d) Amount assessable after decision of Tax Court.] If the jeopardy assessment is made after

the decision of the Tax Court is rendered such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

"(e) Expiration of right to assess. A jeopardy assessment may not be made after the decision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

"(f) Bond to stay collection. When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Tax Court which has become final, together with interest thereon as provided in section 297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Tax Court is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

"(g) Same—Further conditions. If the bond is given before the taxpayer has filed his petition with the Tax Court under section 272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in

such subsection, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.

"(h) Waiver of stay. Upon the filing of the bond, the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall at the request of the taxpayer, be proportionately reduced. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

"(i) Collection of unpaid amounts. When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should

have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

"(j) Claims in abatement. No claim in abatement shall be filed in respect to any assessment in respect of any tax imposed by this chapter.

"(a) [So in original. Probably should be "(k)".] Abatement of jeopardy does not exist. The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court of the United States in respect of the deficiency has been rendered, or, if no petition is filed with the Tax Court of the United States, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the tenth day after the day on which such jeopardy assessment is abated."